



FEMA

November 18, 2009

BY HAND-DELIVERY

Clerk of the Board  
Civilian Board of Contract Appeals  
1800 M Street, N.W.  
6<sup>th</sup> Floor  
Washington, D.C. 20036

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CONTRACT APPEALS

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DOCKET NUMBER: CBCA-1760-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by Sewerage and Water Board of New Orleans (S&WB) and filed as CBCA-1760-FEMA. Submitted with the Response is a binder(s) of exhibits. This arbitration addresses the substantive issues raised by S&WB. However, as stated below, FEMA asserts that the Applicant is not eligible to request arbitration under 44 CFR 206.209.

#### NOTIFICATION REGARDING JURISDICTION

FEMA respectfully notifies the Civilian Board of Contract Appeals that S&WB, the Applicant, is not eligible to request arbitration pursuant to 44 C.F.R. § 206.209(d)(2), because the Applicant did not file a timely second level appeal. The Applicant's failure to file a timely second level appeal caused FEMA's first level appeal determination to become final. Pursuant to 44 C.F.R. § 206.209(d)(2): "Arbitration is not available for any matter that obtained final agency action by FEMA pursuant to § 206.206 prior to February 17, 2009. Arbitration is not available for determinations for which the applicant failed to file a timely appeal under the provisions of § 206.206 prior to August 31, 2009." Consistent with the law, FEMA respectfully requests that this arbitration request be dismissed.

**Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to this arbitration: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or [lindam.davis@dhs.gov](mailto:lindam.davis@dhs.gov);**



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and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or [kim.hazel@dhs.gov](mailto:kim.hazel@dhs.gov).

Very truly yours,



John B. Patterson  
General Attorney  
Office of Chief Counsel  
DHS/Federal Emergency Management Agency  
500 C St., S.W.  
Washington, D.C. 20472

cc: To the Applicant:

Mr. Jason Higginbotham, LEM  
Director of Emergency Management  
Sewerage and Water Board of New Orleans  
635 St. Joseph Street  
New Orleans, LA 70165

To the State:

Mr. Paul W. Rainwater  
Governor's Authorized Representative  
Governor's Office of Homeland Security and Emergency Preparedness  
7667 Independence Boulevard  
Baton Rouge, LA 70806

To the Region:

Mr. Gary Jones  
Acting Regional Administrator  
800 N. Loop 288  
Denton, TX 76209

**Sewerage and Water Board of New Orleans, Louisiana**  
**Replacement of Anti-theft Devices for Fire Hydrants, PW #4165**  
**FEMA-1603-DR-LA**  
**Docket # CBCA-1760-FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO**  
**ARBITRATION REQUEST OF THE SEWERAGE AND WATER BOARD OF NEW**  
**ORLEANS, LOUISIANA**

On October 19, 2009, the Federal Emergency Management Agency (FEMA) received the request of the Sewerage and Water Board of New Orleans, Louisiana (S&WB or Applicant) to arbitrate FEMA's denial of \$2,747,377 for replacement of 9,003 Anti-theft Devices (ATDs) on fire hydrants. This constitutes FEMA's response to the arbitration request by the Sewerage and Water Board of New Orleans.

**JURISDICTION**

The Applicant invokes jurisdiction pursuant to The American Recovery and Reinvestment Act of 2009, P.L. 111-5, which establishes the option for arbitration under the Public Assistance (PA) program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX and DR-1607-LA. See 44 C.F.R. § 206.209.

This Panel does not have jurisdiction to hear this matter. The Applicant failed to file a timely second appeal following FEMA's denial of Applicant's first appeal on August 27, 2007. The arbitration regulations, at 44 C.F.R. § 206.209(d)(2), provide: "Arbitration is not available for determinations for which the applicant failed to file a timely appeal under the provisions of

§206.206 prior to August 31, 2009 . . . .” FEMA regulations, at 44 C.F.R. § 206.206, require that a second-level appeal be filed within 60 days of receipt of the first level appeal decision. Here, the Applicant did not file a second-level appeal with the State until May 23, 2008, nearly nine months after the first- level appeal decision. FEMA, as required by its legal relationship with the State, officially notified the State of the denial on August 27, 2007. It is all but impossible the Applicant was not aware of the denial at the same time. Nevertheless, the State notified Applicant of FEMA’s denial on September 24, 2007. (See Exhibit 6, p.2 and Ex 8 GOHSEP Appeal Analysis p 1) December 1, 2007, or earlier, was, accordingly, the Applicant’s deadline for filing the obligatory second appeal—if it wished to avoid finality of FEMA’s decision not to obligate the PW. Plainly, the matter was final well over a year before the date that marks the time when no final FEMA action is arbitrable, February 17, 2009.

FEMA therefore respectfully requests the Applicant’s request for arbitration be dismissed as it is outside the scope of this Panel’s authority.

In addition, if this Panel invokes jurisdiction to hear this matter, the Applicant has not demonstrated appropriately that floodwater following Hurricane Katrina damaged over 9,000 ATDs and rendered them inoperative. FEMA inspected numerous ATDs with the Applicant after Hurricane Katrina and found them operating properly. McGard, the manufacturer of the ATDs, stated in a letter to the Applicant that further corrosion of the devices will be detrimental to the function of the lock and possibly render the locks inoperable. The manufacturer’s statement does not support the Applicant’s claim that Hurricane Katrina damaged the ATDs and

made them inoperable. The ATDs should be maintained on a regular basis to ensure proper operation.

Therefore, FEMA recommends that the Panel deny the Applicant's request as it is without jurisdiction because the request does not comply with 44 C.F.R. § 206.209(d)(2); and, alternatively, because any difficulties with the ATD pre-existed the storm that led to the disaster declaration that allowed FEMA to provide only supplemental assistance for damage that is directly disaster related .

## **STATUTORY AND LEGAL BACKGROUND**

### **The Stafford Act**

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially-declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").<sup>1</sup> 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area a "major disaster." 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the Declared-area. 42 U.S.C. § 5170.

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<sup>1</sup> The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. 42 U.S.C. § 5164

Under the Stafford act, FEMA may provide, *inter alia*, Public Assistance. The Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. 42 U.S.C. § 5172. Public Assistance (“PA”) allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the Applicant, facility, and work meet eligibility requirements. 44 C.F.R. § 206.200-.206. PA funding can be provided in the form of grants, *inter alia*, for the state’s or local governments’ own recovery efforts, 44 C.F.R. § 206.203.

To receive PA, the Applicant must have an eligible facility as defined by FEMA regulations, the facility must be damaged in a declared major disaster, the facility must be within the disaster declared-area, and the facility must be the legal responsibility of the eligible Applicant. 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221 - .223; 206.226(c)(1). Under PA procedures, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. 44 C.F.R. § 206.202(d). The inspectors record the information they gather on Project Worksheets (“PWs”). Id. PWs record the estimate of damages caused by the disaster, whether the damage is eligible for PA, and list, among other information, the scope and “quantitative estimate for the eligible work.” Id.

After completion of a PW, FEMA reviews the PW to determine whether to approve funding for eligible work. Id. Thereafter, if the determination is that the law allows funding, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on the final PW. 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds.

44 C.F.R. § 206.202(d). A PW only provides estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See Id. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998)(providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

The State of Louisiana is the Grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). The New Orleans Sewerage and Water Board is a subgrantee of the State. See 44 C.F.R. § 206.201(l).

### **Appeals and Arbitration**

The Stafford Act authorizes appeals of PA assistance decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal, the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, establishes an alternative for appealing FEMA action, specifically arbitration of award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603, DR-1604, DR-1605, DR-1606, and DR-1607. See 44 C.F.R. § 206.209. However, the regulations explicitly provide that arbitration is not available where an applicant has failed to file a timely appeal under the provisions of § 206.206 prior to August 31, 2009.



## **The Declaration**

On August 29, 2005, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Katrina pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration authorized all categories of Public Assistance, including emergency work and restoration of permanent facilities. See 42 U.S.C. §§ 5170b and 5172; 44 C.F.R. § 206.223. The President's declaration included New Orleans Parish, making the Orleans Sewerage and Water Board eligible to apply for FEMA Public Assistance for reimbursement of those disaster related emergency and permanent repairs it undertook.

## **Standard of Review**

This Panel must afford considerable deference to FEMA's interpretation of the statutory scheme it has been entrusted to administer, and to its own regulations. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16-17 (1965)(explaining that the "ultimate criterion is the administrative interpretation, which becomes controlling weight unless it is plainly erroneous or inconsistent with the regulation"); Hawaiian Elec. Co., Inc. v. E.P.A., 723 F.2d 1440, 1447 (9th Cir. 1984). As with judicial review under the Administrative Procedure Act (APA), this Panel must affirm FEMA's decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Friends of the Earth v. Hintz, 800 F.2d 822, 830-831 (9<sup>th</sup> Cir. 1986). The Agency's decision is entitled to a presumption of regularity and must be upheld as long as there is a rational basis for it. Citizens

to Preserve Overton Park v. Volpe, 401 U.S. at 415; Friends of the Earth v. Hintz, 800 F.2d at 831. Under the “highly deferential” standard of APA review, this Panel, like a court, “may not substitute [its] judgment for that of the agency” but instead must presume “the agency action to be valid and [will affirm] the agency action if a reasonable basis exists for its decision.” Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1075-76 (9th Cir. 2006)(internal citations omitted

## **BACKGROUND OF PROJECT AND PROCEDURAL HISTORY**

### **The S&WB’s Grant Application (PW 4165)**

S&WB provides sewerage and water services throughout Orleans Parish, Louisiana, including the City of New Orleans. As a result of Hurricane Katrina, floodwater submerged a number of fire hydrants throughout the eastern portion of the City. The Applicant requested \$3 million from FEMA to replace approximately 12,000 “ATDs”, devices that sit atop fire hydrants. (FEMA Exhibit #1) The Applicant claimed that storm waters had inundated all the ATDs and required replacement of these devices.

The ATDs are relatively simple mechanical devices which can be attached to existing hydrants to prevent unauthorized access to the hydrants. Authorized fire-fighting personnel use customized wrenches with special key heads furnished by the manufacturer to operate hydrants equipped with the ATDs. The ATDs have a free-spinning lower shroud and a free-spinning, spring-loaded top cap that prevents access to the operating nut of the fire hydrant, ensuring a tamper/theft resistant system. McGard, manufacturer of the ATD’s employed by the Applicant, advertises

them as “manufactured using the highest quality US materials,” including “triple-nickel chrome plated lock to resist corrosion” and having “alloy steel heat treated to 150,000 psi tensile strength.” (See Applicant’s BATES Nos. 00093 and 00108.) McGard also claims its ATDs are “environmentally sealed and electroplated to resist the elements.” S&WB initially claimed that approximately 12,000 ATDs were installed on hydrants in its district during the two to three years before Katrina, and that Katrina’s storm surge rendered all 12,000 of the ATDs inoperable. FEMA’s investigation revealed that far fewer had any chance to be impacted. Thereafter, the Applicant claimed 9,003 of the hydrants might have been inundated by Katrina’s storm surge.

Following Katrina, S&WB claimed approximately \$385 million in damage to its infrastructure, part of which was for replacing its ATD. FEMA project specialists met with and coordinated with Applicant’s representatives to develop a scope of work for the ATDs which S&WB’s representatives maintained might have been damaged by water introduced into the city as a result of the storm. FEMA’s inspection of the ATDs located inside and outside of the flooded areas found all of the devices, at least those provided by S&WB for FEMA’s examination, functional, and that any corrosion to them appeared to be due to normal wear and tear and of a long-standing nature. Of particular importance, FEMA did not observe any difference in the condition of the ATDs which had been for varying times immersed in the flood waters and those which had remained dry in unflooded areas. FEMA’s project officers, therefore, and reasonably, determined that there was no disaster-related damage to the ATDs. FEMA noted this conclusion in Project Worksheet (PW) 4165 as follows: “Unfortunately, after FEMA inspection, repair and replacement of anti-theft devices not eligible for reimbursement (pre-disaster corrosion damage

over long period of time).” FEMA obligated PW 4165 for “zero dollars,” because the “damage” to the ATDs was not disaster-related.<sup>2</sup>

### **First Appeal**

FEMA denied funding for PW 4165 and notified the Grantee State on May 2, 2006. GOHSEP, the Grantee, informed the Applicant of this decision nine months later, on January 17, 2007. The Applicant submitted its first appeal to the Grantee State on March 12, 2007. The Grantee State forwarded the appeal to the FEMA Region VI office two months later, on May 16, 2007. (FEMA Exhibit #2) In the appeal, the Applicant requested \$3,000,000 to fund replacement of an estimated 10-12,000 ATDs. FEMA initiated the appeal review response process on receipt of the Applicant’s submitted documents.

As part of the appeal review response, FEMA personnel undertook additional site inspections on and about June 14, 2007. By way of those inspections, FEMA re-confirmed a lack of eligible disaster-related damages to the ATDs. As part of the new inspection FEMA tested and operated several ATDs. FEMA thereby verified their functionality. (FEMA Exhibit #3) These were not units FEMA chose to inspect. The Applicant, S&WB, provided these units to FEMA as exemplary of inoperability. FEMA denied the Applicant’s first appeal on August 27, 2007.

(FEMA Exhibit #4) There, FEMA cautioned S&WB it could appeal further if it were aggrieved and must do so in 60 days or less.

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<sup>2</sup> Applicant makes the misleading claim in its arbitration submittal that the FEMA PA Coordinator (PAC) “found” in PW 4165 that the ATDs were “badly corroded and inoperable”. The fact is that in any PW, FEMA project officers merely recite the applicant’s description of the damage for which it seeks reimbursement. The FEMA PAC’s conclusion as to the accuracy of S&WB’s claim in this regard was clearly stated in the PW’s determination that the corrosion, if any, to the ATDs was not disaster-caused.

## **Second Appeal**

The Applicant submitted its second appeal (FEMA Exhibit #5) to the Grantee May 23, 2008.

The Grantee State forwarded it to FEMA on July 22, 2008. Obviously, this was nigh on eleven (11) months from when FEMA notified the State of denial of the first appeal. Significantly, over five of those months elapsed before February 17, 2009, such that FEMA's August 27, 2008, decision became final well before February 17, 2009. See 44 C. F. R. § 206.209 (d)(2).

The Applicant submitted its second appeal over six months after the regulatory deadline for submitting the appeal. The Applicant reduced its claim from 12,000 ATDs to 9,003; although, the dollar figure did not change substantially. Before responding to the appeal, the Director of the Public Assistance Division met with the Applicant and additional personnel in New Orleans to discuss the appeal. The FEMA Assistant Administrator for Disaster Assistance denied the second appeal on April 6, 2009, because the appeal did not comply with 44 C.F.R. § 206.206 and the Applicant did not demonstrate that flood water after Katrina damaged the ATDs. (FEMA Exhibit #6)

## **Applicant Requests Reconsideration of Second Appeal Decision**

The Applicant submitted a request for reconsideration of the second appeal decision to the Grantee on June 26, 2009. (FEMA Exhibit #7) FEMA treated the request as though the Applicant requested arbitration. FEMA responded to the Applicant's letter on August 20, 2009,

informing the Applicant of FEMA's timeframe for publishing of the final rule for arbitration.

(FEMA Exhibit #8)

### **Request for Arbitration**

S&WB submitted this request for arbitration for \$2,747,377 to rehabilitate 9,003 flooded fire hydrants with, allegedly, disaster damaged ATDs. The Applicant attempts to justify this claim by stating the ATDs suffered internal component failures due to extensive exposure to corrosive and brackish flood waters that inundated the city after Hurricane Katrina. The Applicant and Grantee assert that this type of corrosive damage could only occur from immersion in saline, in this case, brackish water. The Applicant supplied documentation from McGard (creator of the ATDs), maintenance records, and a NISTAC analysis of needs. FEMA contracted with NISTAC<sup>3</sup> in late 2006 "...to provide assistance to FEMA in indentifying and resolving issues between FEMA and the Sewerage and Water Board of New Orleans as a result of Hurricanes Katrina and Rita."

NISTAC operated at the request of FEMA to facilitate issue discovery, and was charged to provide assistance to the Applicant in regards to project and programmatic reviews. The Applicant attempts to use this report to substantiate the Applicant's claim of material corrosion damage due to the flooding from the storm.

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<sup>3</sup> NISTAC on occasion provides contracted services for FEMA during disaster events. In this instance it was an attempt to facilitate communications and cooperation between the Applicant and FEMA, to identify different views on related Project Worksheets, and offer alternative solutions.

## DISCUSSION AND ANALYSIS

A major disaster is by definition an event for which Federal assistance is necessary “to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” 42 U.S.C. § 5122(2). As part of the process of “alleviating the damage, loss, hardship, or suffering,” the Stafford Act authorizes assistance for “the repair, restoration, reconstruction, or replacement of a public facility damaged or destroyed by a major disaster.” See 42 U.S.C. § 5172 (a)(1)(A). Federal regulations are clear that eligible work for these purposes must be required as the result of a major disaster event. See 44 C.F.R. § 206.223(a)(1). The Stafford Act and Federal regulations also stipulate that eligible facilities are to be repaired or replaced on the basis of the design of the facility “as it existed immediately prior to the major disaster and in conformity with current applicable codes, specifications, and standards.” See 42 U.S.C. §5172 and 44 C.F.R. § 206.226.

### **Appeal Did Not Meet Appeal Deadline**

44 C.F.R. § 206.209(d)(2) states: “*Final agency action under 206.206: ...Arbitration is not available for determinations for which the Applicant failed to file a timely appeal under the provisions of § 206.206 prior to August 31, 2009...*” The Applicant did not meet the regulatory timeline for submitting a second appeal. The Applicant submitted its second appeal to the Grantee more than six months after the regulatory deadline. The Applicant’s deadline to appeal from the first appeal denial came and went well before February 17, 2009. Therefore, FEMA’s

denial became “final agency action” before that date, such that “arbitration is not available” to this Applicant in this matter. Id.

### **Hurricane Katrina Did Not Render the ATDs Inoperable**

FEMA staff inspected numerous ATDs located at the time of the flooding inside and outside of flooded area with Applicant representatives. They observed corrosion on the ATDs; however, the devices operated properly. The Applicant submitted a December 14, 2005, letter from the manufacturer of the ATDs that purported to indicate that allowing further corrosion to occur to the ATDs will be detrimental to the function of the locks and could render the locked hydrants inoperable. (Applicant BATES Stamp 00011)

The McGard letter did not conclude that the floodwaters after Katrina rendered the ATDs inoperable. McGard did not indicate the number of ATDs it inspected or whether the inspected devices were located inside or outside of the flooded areas. (Applicant BATES Stamp 00011) According to Applicant-supplied documentation, the Applicant replaced 11,969 ATDs, and rehabilitated 12,147 hydrants (Applicant BATES Stamp 00029). This information suggests that the Applicant replaced over 2,000 ATDs that were located outside of flooded areas.

The crux of what support there is for Applicant’s claim the ATDs were corroded and so became inoperable *due to immersion in floodwaters* is at p 2 of 5 of Applicant’s Request for Arbitration. There Applicant alleges fire department concern that ATDs were malfunctioning “during post-Katrina (extensive) firefighting activities.” The Applicant goes on that it “promptly investigated



finding widespread problems with ATDs that were in floodwater-inundated areas.” Apparently, later, the Applicant found the same problem in ATDs that were in always dry areas; because it replaced them. Assuming any material corrosion was to be found, the Panel would have to believe that corrosion manifested itself virtually overnight of the first day of the flooding, not of seawater but of slightly saline lake water, when that well publicized spate of fires occurred in New Orleans. The vastly more likely case is that whatever problem there was with those ATDs on the day after the levee breaches existed on the day before the levee breaches. This all signifies whatever problem that was discovered immediately on the flooding was a preexisting condition for which the Stafford Act makes assistance unavailable and illegal. Put otherwise, the flooding was only an occasion, an inducement, for the Applicant to take an unprecedented look at its fire hydrants, where the hydrants and their attached ATDs had been in whatever condition they were in after the flood well before the flood. Then, when these considerations are joined with the fact the Applicant replaced the ATDs in dry areas of the City, the conclusion that the condition of the ATDs as found at the start of the flooding was long standing is all but inarguable. Therefore, there is nothing in this case coming close to demonstrating FEMA was arbitrary, or even just arguably incorrect, in making the “determination” it did given FEMA’s guiding law.

### **The Same FEMA Staff Did Not Write the PWs and Evaluate the First Appeal**

The Applicant stated in its Arbitration Request (p 3 of 5) that FEMA used the same individuals to write the PWs and to evaluate Applicant’s first appeal. (Applicant Arbitration letter Page 4 of 5) This claim is not supported by facts. FEMA used staffs who were not involved in the initial

determination to evaluate the first appeal. FEMA field personnel in the Transitional Recovery Office completed the initial project formulation and field determinations of eligibility of PW 4165 by May 2006. FEMA Region VI used independent staff to evaluate the first appeal.<sup>4</sup> The Assistant Administrator's staff, well away from the field personnel and those involved in considering the first appeal, evaluated the second appeal.

### **The Amount the Applicant Claims for Replacing ATDs Is Incorrect**

The applicant requests \$2,747,377 to replace ATDs. This figure is broken out on Page 3 of the Applicant's arbitration letter. The cost related to replacing 9003 ATDs is \$1,980,660. The remaining \$766,717 related to normal maintenance (painting and pressure washing, clean and grease, and completion of flushing and static pressure tests) and other ineligible costs.

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<sup>4</sup> As part of normal PA operations, if a dispute is unable to be resolved at the field level during project formulation, the applicant can forward an appeal. The appeals process begins with the applicant submitting their request to the Grantee (State) and the Grantee will forward the appeal to the FEMA Regional Office. The Regional staff makes a determination on the appeal, and may utilize the field personnel that are available, but will make their final appeal determination on their own. In regards to a second appeal, the applicant forwards the appeal to the Grantee, who then forwards it to the Regional Office. The Regional Office may prepare a position paper on the appeal, but the appeal is forwarded to the FEMA Disaster Assistance Directorate at Headquarters. This portion of FEMA will develop the final determination on the second appeal. This process has three different sets of personnel involved, 1) Field personnel writing the PW; 2) Regional staff determining 1<sup>st</sup> appeal; 3) Headquarters staff determining 2<sup>nd</sup> appeal.

## **CONCLUSION AND RECOMMENDATION**

The Applicant request is not eligible for arbitration because it did not submit its second appeal to FEMA in accordance with 44 C.F.R. § 206.206 as required by 44 C.F.R. § 206.209(d)(2).

In addition, FEMA's thorough investigation and inspections of the alleged storm damage to the ATDs established that any damage to the devices was not the result of the disaster, and is therefore ineligible for reimbursement. Under the established standards of review of agency actions, it is clear that FEMA's finding of ineligibility was not arbitrary or capricious, and had a rational basis founded on FEMA's initial investigations of the damage to the ATDs, and subsequent investigation and inspections following the filing of S&WB's first appeal. To approve funding of these costs would contravene the Stafford Act and implementing regulations, which mandate funding of disaster-related costs, only. Accordingly, it is respectfully submitted that the arbitration claim of S&WB should be dismissed on this basis.

Respectfully submitted on this 17th day of November 2009 by,

A handwritten signature in dark ink, appearing to read "John B. Patterson", is written over a horizontal line.

John B. Patterson  
General Attorney  
Office of Chief Counsel  
Federal Emergency Management Agency

Attachments:

Cc Jason Higginbotham, L.E.M.  
Director of Emergency Management  
Sewerage and Water Board of New Orleans

Mark Riley  
Deputy Director  
Governor's Office of Homeland Security and Emergency Preparedness

Gary Jones  
Acting Administrator  
Federal Emergency Management Agency Region VI

LIST OF EXHIITS

Exhibit #1 PW 4165v0  
Exhibit #2 Applicant/GOHSEP First Appeal  
Exhibit #3 June 17, 2007 Inspection Items  
Exhibit #4 First Appeal Response  
Exhibit #5 Applicant/GOHSEP Second Appeal  
Exhibit #6 Second Appeal Response  
Exhibit #7 Applicant Reconsideration of Second Appeal Request  
Exhibit #8 FEMA response to reconsideration request